

## NOTES

# Women and Mediation: Toward a Formulation of an Interdisciplinary Empirical Model To Determine Equity in Dispute Resolution

MICHELLE R. EVANS\*

### I. INTRODUCTION

Nineteen years ago, Carol Gilligan's seminal and controversial psychological study *In a Different Voice* was published.<sup>1</sup> In her conclusion, Gilligan stated,

As we have listened for centuries to the voices of men and the theories of development that their experience informs, so we have come more recently to notice not only the silence of women but the difficulty in hearing what they say when they speak . . . . The failure to see the different reality of women's lives and to hear the differences in their voices stems in part from the assumption that there is a single mode of social experience and interpretation.<sup>2</sup>

Gilligan concluded that the moral development of men and women in this society were in part conflicting, resulting in a tension between an ethic of care and an ethic of rights and responsibilities. This conflict was evidenced in Gilligan's research by a disparity of choices of behavior between males and females.<sup>3</sup>

There are marked differences in the social conditions in which men and women find themselves.<sup>4</sup> Women on the average earn seventy-four cents for

---

\* B.A., Smith College, 1993; J.D. Candidate, The Ohio State University Moritz College of Law, 2002.

<sup>1</sup> See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

<sup>2</sup> *Id.* at 173.

<sup>3</sup> *Id.* at 174.

<sup>4</sup> To speak of the experiences of men and women is to speak in general terms, which may not represent the experiences of any one individual. Linda Stamato, *Voice, Place, and Process: Research on Gender, Negotiation, and Conflict Resolution*, 9 *MEDIATION Q.* 375, 376 (1992) (stating, "[i]nquiry into gender differences . . . has a troubling moral and ethical dimension, carrying as it does the risk of reinforcing bias and prejudice and contributing to stereotyping and discrimination.").

every comparable dollar that men earn.<sup>5</sup> In addition, women are primarily employed in low-paying industries and professions: women "account for 90 percent of dental hygienists and over 98 percent of secretaries, typists, and kindergarten teachers. They fill three quarters of the clerical positions in U.S. companies but only a little better than 30 percent of the managerial slots."<sup>6</sup> Yet women have increasingly accepted roles which traditionally have been exclusively held by men.<sup>7</sup> Women act as consumers,<sup>8</sup> as merchants,<sup>9</sup> as employees,<sup>10</sup> as employers;<sup>11</sup> women are no longer absolutely relegated to stereotypical roles.<sup>12</sup> As Deborah M. Kolb and Judith Williams have noted, negotiation skills are of growing importance for women in our society:

All the change that is taking place around us has upped the ante on negotiating skills. On the domestic front, husbands once brought home the only paychecks and controlled the purse strings. Today nuclear families are fragmented, as likely to be headed by a woman as a man. Not long ago, bosses and their lieutenants decided who would do what work and for what pay. Employees had little room or incentive to negotiate. As organizations have become flatter and leaner, it is up to the employee to negotiate her next job. She cannot count on the one she has today being there tomorrow.<sup>13</sup>

---

<sup>5</sup> DEBORAH M. KOLB, PH.D. & JUDITH WILLIAMS, PH.D., *THE SHADOW NEGOTIATION: HOW WOMEN CAN MASTER THE HIDDEN AGENDAS THAT DETERMINE BARGAINING SUCCESS* 9 (2000) (citing Joanna Likrotz, *Getting Even*, WORKING WOMEN, July-Aug. 1999, at 42).

<sup>6</sup> *Id.* (citing BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *WORKING WOMEN: A CHARTBOOK* (1991); EMPLOYMENT AND EARNINGS tbl.22 (1992)).

<sup>7</sup> *See id.* at 9-13.

<sup>8</sup> *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

<sup>9</sup> *See* KOLB & WILLIAMS, *supra* note 5, at 9-13.

<sup>10</sup> *See* Denise H. Lach & Patricia A. Gwartney-Gibbs, *Sociological Perspectives on Sexual Harassment and Workplace Dispute Resolution*, 42 J. OF VOCATIONAL BEHAV. 102 (1993).

<sup>11</sup> *See* KOLB & WILLIAMS, *supra* note 5, at 9-13.

<sup>12</sup> *See id.*; *see also* Elizabeth R. Cole et al., *Changing Society, Changing Women (and Men)*, in *HANDBOOK OF THE PSYCHOLOGY OF WOMEN AND GENDER* 410, 413 (Rhoda K. Unger ed., 2001) (reporting changes in women's careers since 1970 and 1971).

<sup>13</sup> *Id.* at 13. *See also* Alice F. Stuhlmacher & Amy E. Walters, *Gender Differences in Negotiation Outcome: A Meta-Analysis*, 52 PERSONNEL PSYCHOL. 653, 653 (1999) (stating, "[a]s greater numbers of women advance into upper level positions in organizations it is increasingly important to have an understanding of how gender impacts the behaviors, processes, and outcomes of negotiation").

If women do indeed speak in a different voice, that different voice is being spoken in an increasingly wider variety of fora.<sup>14</sup> Indeed, it is apparent that of the fora in which women are participating with more frequency are dispute resolution proceedings.<sup>15</sup>

Although there is a wealth of empirical research on the differences of gender in psychological and sociological interactions,<sup>16</sup> there is less scholarship in the field of dispute resolution, and in mediation in particular.<sup>17</sup> It has been recognized that power differentials exist between different classes

---

<sup>14</sup> For a discussion of the impact of gender on computer-mediated communications, see Laura J. Gurak, "Is This the Party to Whom I Am Speaking?:" *Women, Credibility and the Internet*, THE WOMEN'S REV. OF BOOKS, Feb. 2001, at 5; Cheris Kramarae & Jana Kramer, *Legal Snarls for Women in Cyberspace*, 5 INTERNET RESEARCH: ELECTRONIC NETWORKING APPLICATIONS & POL'Y 14 (1995); N. M. Sussman & D. H. Tyson, *Sex and Power: Gender Differences in Computer-Mediated Interactions*, 16 COMPUTERS IN HUM. BEHAV. 381 (2000); and Joanna L. Wolfe, *Why Do Women Feel Ignored? Gender Differences in Computer-Mediated Classroom Interactions*, 16 COMPUTERS & COMPOSITION 153 (1999).

<sup>15</sup> See, e.g., Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 703-04 (1997) (Rather than suffer the delays and expense of adversary proceedings, couples pursuing divorce, environmental agencies seeking compliance with governmental regulations, communities embroiled in public policy debates, employers facing discrimination charges, law enforcement agencies handling certain misdemeanors, and other civil disputants, have turned increasingly in recent years toward a "mediated solution.") (citations omitted).

<sup>16</sup> See, e.g., CHARLES DERBER, *THE PURSUIT OF ATTENTION: POWER AND EGO IN EVERYDAY LIFE* (2000); GILLIGAN, *supra* note 1; Sylvia Beyer, *Gender Differences in Self-Perception and Negative Recall Biases*, 38 SEX ROLES 103 (1998); Y. Rim, *Coping Styles, Impulsiveness, Venturesomeness and Empathy*, 18 PERSON. INDIVID. DIFF. 159 (1995).

<sup>17</sup> Some discussions of this topic include women's testimonials of their experiences in negotiation settings. E.g., Clare Boardman and Richard Beach, *Mixed-Gender Teamwork in Negotiation*, 9 AUSTRALIAN DISP. RESOL. J. 110 (1998); Carolyn Brooks, *Don't Fence Us In*, 9 AUSTRALIAN DISP. RESOL. J. 94 (1998); Maryanne Kelly, *The Benefit of the Doubt*, 9 AUSTRALIAN DISP. RESOL. J. 91 (1998); Annette Musolino, *Gender Expectations: Impact on Negotiators*, 9 AUSTRALIAN DISP. RESOL. J. 103 (1998); Fran Rowe, *Sovereignty and Respect*, 9 AUSTRALIAN DISP. RESOL. J. 98 (1998); see also KOLB & WILLIAMS, *supra* note 5. In addition, research has been conducted on the differing negotiation styles between men and women. See, e.g., Ayres, *supra* note 8; Carol M. Rose, *Bargaining and Gender*, 18 HARV. J.L. & PUB. POL'Y 547 (1995); Stamato, *supra* note 4; Stuhlmacher & Walters, *supra* note 13; Amy E. Walters et al., *Gender and Negotiator Competitiveness: A Meta-Analysis*, 76 ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES 1 (1998). It should be noted, however, that the effects of gender on the quality and outcome of mediation may differ from pure negotiation settings: one may expect the presence of a mediator to minimize some of the disparity, and given the fundamental principles of mediation, one can also expect a democratization of the dispute resolution process. See discussion *infra* Part I.

of individuals who may be involved in dispute resolution,<sup>18</sup> and, indeed, there is evidence of increased research on the potentially disparate interactions between men and women in the setting of mediation.<sup>19</sup>

This Note addresses the need for additional empirical research by proposing a research design aimed both at assessing disparate bargaining power in the mediation process and testing hypotheses as to remedies for power differentials based on gender. Part II addresses the process of mediation, its fundamental goals, and its increased use as it has been legitimized. Part III of this Note provides a brief summary of recent psychological and sociological gender studies. This survey is conducted with constant reference to implications for dispute resolution: what do the conclusions of the research of the behavioral sciences suggest in way of gender-specific behaviors which may appear in the dispute resolution process—in particular, mediation?<sup>20</sup> Research on bargaining differentials in the setting of negotiation is discussed, as are the results of research indicating bargaining disparity in mediation settings. Part IV addresses the import of the implications: what purposes of mediation are served in determining whether a disparity in bargaining power or behavior between the sexes exists? Part V suggests a research design, based on hypotheses drawn from psychological and sociological research, as well as alternative dispute resolution literature. This Note addresses the special challenges that would present themselves in a research design model of mediation. This research design is based on psychological, sociological, and alternative dispute resolution models to measure behavioral responses, based on gender, during mediation. Such a model could potentially be modified to assess power differentials, not solely

---

<sup>18</sup> E.g., Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55 (1995).

<sup>19</sup> The power differential, from the perspective of gender, appears to be best documented in family mediation settings. E.g., Renata Alexander, *Family Mediation: Friend or Foe for Women?*, 8 AUSTRALIAN DISP. RESOL. J. 255 (1997); Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 FAM. L. Q. 223 (1994); Penelope Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931 (1997); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553 (1995); Randy Frances Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution*, 36 ARIZ. L. REV. 879 (1994); Edward Kruk, *Power Imbalance and Spouse Abuse in Divorce Disputes: Deconstructing Mediation Practice Via the "Simulated Client" Technique*, 12 INT'L J. OF L., POL'Y & THE FAM. 1 (1998).

<sup>20</sup> Although the results of studies in domestic dispute resolution are illustrative of the issues to be addressed, this Note focuses primarily on dispute resolution in a wider variety of contexts.

on the basis of gender, but also on the basis of additional factors such as race, socioeconomic status, and age.<sup>21</sup> In addition, the model could be modified to determine disparities between classes of people in dispute resolution proceedings other than mediation.

The questions to be addressed focus on the difference of mediation styles between the genders. The goals of such research are manifold: if women indeed communicate differently from men, the *process* of mediation can be modified to account for such difference.<sup>22</sup> That is, mediators and the administrators of mediation programs can attempt to decrease the inequities of bargaining disparity in the mediation setting by building procedural safeguards into the mediation process itself.<sup>23</sup> Alternatively, women can be taught to communicate in ways which allow them equal bargaining leverage in a mediation setting.<sup>24</sup>

---

<sup>21</sup> See, e.g., Patricia Flynn Weitzman, *Brief Report: Young Adult Women Resolving Interpersonal Conflicts*, 8 J. OF ADULT DEV. 61 (2001); Patricia Flynn Weitzman & Eben A. Weitzman, *Interpersonal Negotiation Strategies in a Sample of Older Women*, 6 J. OF CLINICAL GEROPSYCHOLOGY 41 (2000).

<sup>22</sup> It is just this kind of procedural, rather than substantive, consideration which has been invoked by activist mediators, such as Lawrence Susskind. See John Forester, *Lawrence Susskind: Activist Mediation and Public Disputes*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 309, 332 (Deborah M. Kolb ed., 1994) (interviewing Lawrence Susskind).

<sup>23</sup> Such procedural safeguards may include traditional mediation techniques, such as ensuring each party can "explain and advocate its interests to the other" party, assisting the parties to "develop options that maximize their interests;" as well as more controversial techniques, such as allowing the mediator to take some steps in evaluating. DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 257-62, 267-305 (1996). See discussion *infra* Part IV.

<sup>24</sup> See *id.* Catharine MacKinnon has noted that issues of gender differences have employed two different standards:

If you see gender as a hierarchy—in which some people have power and some people are powerless, relatively speaking—you realize that the options of either being the same as men or being different from men are just two ways of having men as your standard. Men are set up as a standard for women by saying either: "You can be the same as men, and *then* you will be equal," or "You can be different from men, and *then* you will be *women*."

Ellen C. Dubois et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 21 (1985). Likewise, the framing of a resolution to gender differences in mediation could take the form of either honoring the differences and accommodating them through changes in mediation procedure, or teaching women how to meet the male mediation "standard." See *id.*; discussion *infra* Part V.

## II. MEDIATION: THE PROCESS, ITS LEGITIMIZATION, AND ITS UNDERLYING PRINCIPLES

### A. *The Process of Mediation*

Mediation is marked by "two common elements: (1) third-party facilitation of dispute settlement, and (2) lack of third-party power to determine the resolution of the dispute."<sup>25</sup> That is, the mediator's role is to serve as a neutral to assist disputing parties in resolving their dispute,<sup>26</sup> but the mediator has no authority to bind the parties to an agreement.<sup>27</sup> Mediation is a more informal process than traditional litigation.<sup>28</sup>

One of the goals of the mediator is to explore settlement options, to achieve a "durable settlement agreement."<sup>29</sup> In so doing, the mediator may use such procedural techniques as setting an agenda in which introductions and "[a]n explanation of the mediation process and the roles of the mediator and participants" are included.<sup>30</sup> The mediator may attempt to gather information from the disputing parties to "clarify[ ] positions and priorities," "probe[ ] for obstacles to settlement," and "build[ ] trust and optimism."<sup>31</sup> In addition, the mediator may conduct caucuses, in which the disputing parties meet with the mediator privately to explore settlement options.<sup>32</sup> Thus, the process of mediation allows the parties both to air their grievances, and, ostensibly, to exercise autonomy in the resolution of their dispute.<sup>33</sup>

### B. *The Legitimization of Mediation*

Among the historic sources of mediation are labor mediation<sup>34</sup> and the community mediation movement, which arose from both sociopolitical movements of the 1960s and the movement to reform the civil justice

---

<sup>25</sup> Donald T. Weckstein, *In Praise of Party Empowerment—And of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 508 (1997).

<sup>26</sup> GOLANN, *supra* note 23, at 4.

<sup>27</sup> Weckstein, *supra* note 25, at 508.

<sup>28</sup> See GOLANN, *supra* note 23, at 3–4.

<sup>29</sup> *Id.* at 3.

<sup>30</sup> *Id.* at 63.

<sup>31</sup> *Id.* at 70–71.

<sup>32</sup> *Id.* at 71–73.

<sup>33</sup> See *id.* at 3; Weckstein, *supra* note 25, at 508.

<sup>34</sup> Weckstein, *supra* note 25, at 512.

system.<sup>35</sup> Part of mediation's history can be found in grassroots movements which were concerned primarily with providing alternative, reformatory dispute resolution mechanisms to groups of individuals who otherwise could be treated unfairly in traditional court proceedings.<sup>36</sup> Over time, mediation and other dispute resolution processes have become legitimized: they are increasingly accepted as means by which the judiciary and other agencies conduct their business.<sup>37</sup> Mediation may promise benefits which the

---

<sup>35</sup> Timothy Hedeon & Patrick G. Coy, *Community Mediation and the Court System: The Ties That Bind*, 17 *MEDIATION Q.* 351 (2000).

<sup>36</sup> *Id.* at 352.

<sup>37</sup> See Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 *FLA. ST. U.L. REV.* 903, 904 (1997). See also EDWARD J. BERGMAN & JOHN G. BICKERMAN, *COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS* vi (1998) (noting that, as of 1996, approximately half of the states in the country had court-annexed mediation programs, and over half of the federal district courts had mediation programs in place); Grillo, *supra* note 19, at 1551-55 (noting the increased requirement of mandatory mediation in child custody cases in California); Judith Resnick, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 *OHIO ST. J. ON DISP. RESOL.* 211, 262 (1995) (arguing that those who "envisioned [alternative dispute resolution] as the blossoming of something different and generative . . . should worry . . . about its institutionalization and its transformation into the very adversarial processes that they had hoped to avoid").

An issue related to the legitimization and the "institutionalization" of mediation and other forms of dispute resolution is whether reliance on such "alternative" methods for resolving disputes is warranted in certain circumstances. See, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 *GEO. L.J.* 2663 (1995). It has been noted that the traditional legal system may in fact disserve the needs of women and other groups in society. Grillo has noted that

The western concept of law is based on a patriarchal paradigm characterized by hierarchy, linear reasoning, the resolution of disputes through the application of abstract principles, and the ideal of the reasonable person. Its fundamental aspiration is objectivity, and to that end it separates public from private, form from substance, and process from policy.

Grillo, *supra* note 19, at 1547; see also CATHARINE A. MACKINNON, *SEX EQUALITY* 23 (2001) ("Legal institutions have largely supported or enforced these [gender] inequalities, whether women are expressly stripped of legal rights by law, given formal equality in countries where legal rules are not the real rules, or given sex equality where law counts but gender-specific violations of it are ignored."); Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 *N.Y.U. L. REV.* 1635, 1643 (1991) (stating, "[t]he life situations of the abnormal often do not translate well into the language of law; as a result, the legal system does not satisfactorily address their needs."). Alternative dispute resolution processes may serve as preferential fora: if the legal system does not hear the voice of women, perhaps women's voices stand a better chance at being heard in an alternative dispute resolution proceeding. See Grillo, *supra* note 19, at 1548.

traditional legal system may be unlikely to provide: mediation may allow the continuance of a relationship beyond the resolution of the dispute, be more effective in resolving emotional disputes, provide an opportunity for a greater number of participants to be involved, and result in satisfactory settlements of "nonmonetary" disputes.<sup>38</sup>

Indeed, women may be feeling increased pressure to enter into mediation in a variety of fora. Women are increasingly encouraged or required to mediate divorce, custody, and visitation disputes.<sup>39</sup> Likewise, mediation of sexual harassment cases has been advocated.<sup>40</sup> Given the legitimization of mediation, and the presumed increased participation of women in mediating disputes, further research of women's roles in mediation thus appears to be warranted.

### C. Principles of Mediation

The ethical standards which have been developed to guide the conduct of mediators provide insight into the underlying principles of mediation. The American Arbitration Association, the Litigation and Dispute Resolution Sections of the American Bar Association, and the Society of Professionals in Dispute Resolution (SPIDR) have approved and endorsed the *Model Standards of Conduct for Mediators* (Model Standards).<sup>41</sup> The Model Standards "draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation."<sup>42</sup> Among the principles stated in the model standards are 1) self-determination, 2) impartiality, and 3) an obligation to ensure the quality of the mediation process.<sup>43</sup> Likewise, the Ethical Standards of Professional Responsibility adopted in 1986 by the Society of Professionals in Dispute

---

<sup>38</sup> GOLANN, *supra* note 23, at 6.

<sup>39</sup> Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1545.

<sup>40</sup> See, e.g., Edward J. Costello, Jr., *The Mediation Alternative in Sex Harassment Cases*, ARB. J., Mar. 1992, at 16, 20-21 (1992). See generally Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135 (1999); Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27 (1993); Lach & Gwartney-Gibbs, *supra* note 10.

<sup>41</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS, (Am. Arbitration Ass'n et al., 1999), available at <http://www.adr.org/rules/ethics/standard.html> (last visited Aug. 17, 2001) [hereinafter MODEL STANDARDS].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



Resolution set forth similar ideals and principles.<sup>44</sup> The implication of gender disparity on the mediation process is to be considered in light of these principles.

### 1. *Self-Determination*

The Model Standards state “[s]elf-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a *voluntary, uncoerced* agreement.”<sup>45</sup> This principle provides that mediation is a democratic process, in which any one of the participants may veto a proposed outcome:

The most fundamental principle, that of equality, requires us to treat each person with equal dignity and respect; mediation eliminates paternalism, authoritarianism, and bloodshed from dominating the decision-making process, and ensures that each decision maker counts as one and no more than one. We reinforce this principle through our commitment to democratic decision making: we believe that decisions should be made by the people, not by kings or technocrats, and mediation requires that those directly affected by the outcome participate in the decision-making process.<sup>46</sup>

The goal, then, is to provide a setting in which disparity between the disputing parties is minimized, so that a mutually acceptable agreement is reached.<sup>47</sup>

### 2. *Impartiality*

The principle of impartiality is “central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct

---

<sup>44</sup> SPIDR ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY, 1986, *available at* <http://www.spidr.org/ethic.htm> [hereinafter SPIDR STANDARDS]. The SPIDR STANDARDS apply generally to all third-party neutrals, including mediators. *Id.*; Weckstein, *supra* note 25, at 527 n.125.

<sup>45</sup> MODEL STANDARDS, *supra* note 41 (emphasis added).

<sup>46</sup> JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* 22 (1987).

<sup>47</sup> *See id.* at 15. Consistent with the ideal of self-determination is the obligation of informed consent, announced by the SPIDR Standards. SPIDR Standards, *supra* note 44. The SPIDR Standards provide, “The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties’ relationship to the neutral.” *Id.*

the process in an impartial manner, the mediator is obligated to withdraw.”<sup>48</sup> The SPIDR Standards define impartiality as “freedom from favoritism or bias, either by word or action, and a commitment to serve all parties as opposed to a single party.”<sup>49</sup> Impartiality requires that the mediator “treat all parties in comparable ways, both procedurally and substantively.”<sup>50</sup> For example, a mediator “cannot address some persons informally but others by title, convene meetings at sites that are inconvenient to some but advantageous to others, or encourage parties to consider settlement terms from which the mediator would personally profit.”<sup>51</sup>

### 3. *Obligation to Ensure the Quality of the Mediation Process*

Another principle enunciated in the Model Standards is the obligation of the mediator to ensure the “quality of the [mediation] process:”

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.<sup>52</sup>

Likewise, the SPIDR Standards provide that “[n]eutrals have a duty to the parties, to the professions, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of their parties’.”<sup>53</sup> Thus, while maintaining impartiality, the mediator must ensure that the parties respond to each other with respect and dignity. The mediator must ensure that the voice of each party to the dispute is heard.

---

<sup>48</sup> MODEL STANDARDS, *supra* note 41.

<sup>49</sup> SPIDR STANDARDS, *supra* note 44.

<sup>50</sup> STULBERG, *supra* note 46, at 37.

<sup>51</sup> *Id.*

<sup>52</sup> MODEL STANDARDS, *supra* note 41.

<sup>53</sup> SPIDR STANDARDS, *supra* note 44. The SPIDR Standards also provide that a mediator should “support the profession:” “The experienced neutral should participate in the development of new practitioners in the field and engage in efforts to educate the public about the value and use of neutral dispute resolution procedures. The neutral should provide pro bono services, where appropriate.” *Id.*

### D. *Mediation's Promise of Bargaining Equity*

With an emphasis on equity between the parties, impartiality of the process, and neutrality of the mediator himself or herself, the ostensible promise of mediation is to eliminate bargaining disparities to facilitate a mutually agreeable resolution. Nevertheless, the principles of mediation may, in some instances, result in mediation's promotion of bargaining disparity and inequity.<sup>54</sup> For example, "the 'appearance' of partiality is not the same as actual partiality."<sup>55</sup> That is,

while the *form* may be more acceptable to process-oriented mediators, the real objective of the concerned mediator may be to try to correct an imbalance in knowledge or bargaining power and, thus, empower the disadvantaged party in an attempt to prevent that party from being unduly taken advantage of by the more informed party.<sup>56</sup>

Relative to the interaction between gender and mediation, there remain questions which have not definitively been addressed: 1) how does gender affect the process and outcome of mediation itself?; 2) in particular, in consumer and workplace disputes, in which women, presumptively, are increasingly involved, how does gender impact the mediation process (i.e., in mediation settings in which the parties are at arm's length, how does gender affect mediation?); and 3) how do lay participants in dispute resolution (i.e., those who have not been trained in law school or elsewhere as to negotiation strategy and technique) respond, based on gender? Previous research suggests answers to these questions, but a new design can be introduced to further refine inquiries, generate results which can be generalized, and test hypotheses for solutions to gender disparity.

### III. GENDER AND COMMUNICATION; GENDER AND NEGOTIATION

Although the topic of gender disparity is relatively new to the field of dispute resolution,<sup>57</sup> the topic of gender and communication has been studied for some time by sociologists and psychologists.<sup>58</sup> The studies of gender and communication which are relevant to the mediation setting can be found both

---

<sup>54</sup> Weckstein, *supra* note 25, at 535-37.

<sup>55</sup> *Id.* at 536.

<sup>56</sup> *Id.* at 535-36.

<sup>57</sup> See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

<sup>58</sup> See, e.g., DERBER, *supra* note 16, at 9-19; GILLIGAN, *supra* note 1.

in general sociological and psychological research and in studies of gender disparity in negotiation settings.<sup>59</sup>

The question of observing gender disparity in alternative dispute resolution fora arises in part from the perspective of contextual legal criticism.<sup>60</sup> Sociologist Erving Goffman noted that stigmatized people, those marginalized in society, have “a tendency to ‘go meta’—to withdraw from fully focused participation in a social scene and to attend instead to the interactive dynamics of the scene.”<sup>61</sup>

If, for example, I suspect that an interaction with another person is affected by the fact that I am black, or a woman, my focus shifts—or shifts back and forth—from the content of the interaction to the interactive process itself as it is affected by my race and sex.<sup>62</sup>

The perspective of one who “goes meta” allows a critique of the social forces which propel unconscious behavior on both an individual and an institutionalized level.<sup>63</sup> While the traditional legal system has not failed to escape the scrutiny of this contextual perspective,<sup>64</sup> those forms of dispute resolution which have increasingly become legitimized and institutionalized have been viewed less critically, from the perspective of gender disparity.<sup>65</sup> The apparent irony, however, if gender disparity exists in alternative dispute resolution procedures, is that the stigmatized, who may not be heard in a traditional legal context, may not be granted a fully equitable voice in an alternative forum.<sup>66</sup>

---

<sup>59</sup> See discussion *infra* Part III. Indeed, the broader topic of the impact of gender on negotiator behavior has been studied for some time. See, e.g., Deborah M. Kolb, *More Than Just a Footnote: Constructing a Theoretical Framework for Teaching About Gender in Negotiation*, 16 NEGOTIATION J. 347, 348 (2000) (citing JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* (1975)).

<sup>60</sup> See, e.g., Davis, *supra* note 37, at 1636.

<sup>61</sup> *Id.* (citing ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 111 (1963)).

<sup>62</sup> *Id.* (citing ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 111 (1963)).

<sup>63</sup> *Id.* at 1636–37.

<sup>64</sup> See, e.g., *id.*

<sup>65</sup> But see, e.g., Grillo, *supra* note 19; Nina R. Meierding, *Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements*, 11 MEDIATION Q. 157 (1993); Stamato, *supra* note 4; Victor D. Wall, Jr. & Marcia L. Dewhurst, *Mediator Gender: Communication Differences in Resolved and Unresolved Mediations*, 9 MEDIATION Q. 63 (1991).

<sup>66</sup> See Davis, *supra* note 37, at 1643. Davis notes that the contextual legal argument acknowledges “that legal scholarship must attend to the phenomena of conceptualization

### A. Gender and Communication Style

Both academia and popular culture have acknowledged that the genders communicate differently.<sup>67</sup> It has been proposed that, because “women are more risk averse” than men, they avoid exposing themselves to risk in interpersonal situations, and they behave differently than men in competitive settings.<sup>68</sup> While stereotyped behavior such as this may have empirical

---

that precede formal judgment . . . . It does so on the theory that processes outside the frame of the judicial opinion deserve the same detailed examination as do the syllogisms of appellate opinions.” *Id.* at 1645. To turn the looking glass to face alternative dispute resolution—mediation, in particular—is to acknowledge that gender, as well as other contextual considerations, may shape the process and substance of mediation. As Grillo has noted,

[m]ediation has been embraced for a number of reasons. First, it rejects an objectivist approach to conflict resolution, and promises to consider disputes in terms of relationships and responsibility. Second, the mediation process is, at least in theory, cooperative and voluntary, not coercive. . . . Third, since in mediation there are no rules of evidence or legalistic notions of relevancy, decisions supposedly may be informed by context rather than abstract principle. Finally, in theory at least, emotions are recognized and incorporated into the mediation process.

Grillo, *supra* note 19, at 1547–48. Despite this “promise” of mediation, Grillo concluded, “rather than being a feminist alternative to the adversary system, mediation has the potential actively to harm women.” *Id.* at 1550.

<sup>67</sup> *E.g.*, DEBORAH TANNEN, PH.D., *YOU JUST DON’T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 42 (1990) (stating, “communication between men and women can be like cross-cultural communication, prey to a clash of conversational styles. Instead of different dialects, it has been said they speak different genderlects.”); Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 309–21 (1999) (summarizing “real and perceived gender differences”). It has been noted that some of the disparity between men’s and women’s communication styles may result from a self-fulfilling prophecy. In their study, Sandra R. Farber and Monica Rickenberg noted,

By creating a statistical image of ‘women,’ . . . we may unintentionally have reinforced the gender norms that we seek to critique. At the same time, we risk excluding from that image those women who may not identify with our statistical norm; who may, because their sense of identity hinges not only or primarily on gender, but also includes such other facets of self as race, ethnicity, sexual identity, age, or disability, feel excluded or silenced by this image of a unitary ‘women’s experience.’

Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J.L. & FEMINISM 271, 277 (1999). Thus, generalizations made as to women’s behavior and experiences should cautiously be applied to individuals. *See also* Stamato, *supra* note 4, at 376.

<sup>68</sup> Craver & Barnes, *supra* note 67, at 300–01, 312 (noting women are more likely to avoid competition and perform less successfully than men in competitive settings).

support, in some cases, perceptual conjecture may be the sole basis of conclusions of gender disparity.<sup>69</sup> Whether real or perceived, such gender differences may impact the parties in the setting of mediation.<sup>70</sup> That is, even if the gender differences are merely perceived to exist, "they may influence the way in which men and women interact when they negotiate, because the participants expect these factors to affect their dealings."<sup>71</sup> These gender differences may be subtle, unconscious.<sup>72</sup> Nevertheless, given the goals and principles of mediation, the process of mediation can be served by recognizing such differences, should they exist, and ensuring that the process of mediation is as equitable as possible.<sup>73</sup> That is, if gender differences do exist, they should be brought to light: "The goal is to learn and to teach by exposing and taking control of unconscious patterns of behavior."<sup>74</sup>

Commentators have noted that in their use of language, men and women differ.<sup>75</sup> While there are narrative conventions which apply to society as a whole,<sup>76</sup> different conventions are followed, generally, based on gender.<sup>77</sup> For example, a difference between the expressiveness of men and women has been noted: men tend to be more expressive than women in their choice of language.<sup>78</sup> In addition, women tend to "request," whereas men are more apt to "command."<sup>79</sup> And while women are likely to use "tag questions," which are "appended to an assertion" and which "seek[ ] the listener's assent,"<sup>80</sup> men avoid such questions.<sup>81</sup> These conventions based on gender have been

---

<sup>69</sup> *Id.* at 309.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See KOLB & WILLIAMS, *supra* note 5, at 27 (stating, "[l]ike the proverbial fish unaware its environment is wet, we often swim in gendered waters in negotiation without realizing it") (citation omitted).

<sup>73</sup> See discussion *infra* Part II.C.

<sup>74</sup> Davis, *supra* note 37, at 1639.

<sup>75</sup> *Id.* at 1647-55.

<sup>76</sup> See, e.g., *id.* at 1646-47 (noting, for example, that effective narratives generally "give the tale meaning by revealing some deviation from the expected;" in addition, effective narratives generally end with "an evaluative coda in the form of a comment upon the meaning of the tale").

<sup>77</sup> *Id.*

<sup>78</sup> For example, while a man might exclaim with profanity that he lost his keys, a woman might merely state, "Oh, dear, I lost my keys." *Id.* at 1647-48.

<sup>79</sup> *Id.* at 1648 (providing the example, a man might make the statement "Close the door," while a woman might ask "Won't you please close the door?").

<sup>80</sup> *Id.* at 1665 n.148. An example of a "tag question" is, "He was out at third, wasn't he?" *Id.* at 1648.

<sup>81</sup> Curiously, women and men have been perceived differently when they have employed tag questions. In a study by Patricia Hayes Bradley, results indicated that when

construed to reinforce the "subordination" of women in society and the "dominance" of men.<sup>82</sup>

Alternatively, Deborah Tannen<sup>83</sup> has asserted that the conversational differences between men and women are evidence of different styles of communicating: "report-talk," and "rapport-talk."<sup>84</sup> That is, men in conversation seek to demonstrate "knowledge and skill:" "For most men, talk is primarily a means to preserve independence and negotiate and maintain status in a hierarchical social order."<sup>85</sup> However, for women, "the language of conversation is primarily a language of rapport: a way of establishing connections and negotiating relationships."<sup>86</sup>

Among the additional differences noted between the communication styles of men and women in negotiation settings is duration of time spent talking: when women and men are talking, men tend to have the floor for a

---

women used tag questions, "subjects judged them as less intelligent and knowledgeable than men who also used them." TANNEN, *supra* note 67, at 228.

<sup>82</sup> Davis, *supra* note 37, at 1648 (citing ROBIN LAKOFF, *LANGUAGE AND WOMAN'S PLACE* 8-50 (1975)).

Researchers John Conley, William O'Barr, and E. Allan Lind noted that women's willingness to express uncertainty, in legal contexts, was viewed as "powerless." *Id.* at 1652-53 (citing John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1380 (1998)). The "powerless style" was identified by use of "hedges," such as "I think it's red;" "hesitations" ("well, uh, mmmh, red"); "question intonation" ("[i]t's red?"); "intensifiers" ("[i]t's really red"); and "polite forms" ("[i]t's red, sir"). *Id.* at 1652. The result of Conley, O'Barr, and Lind's study was that "female witnesses used the powerless ... style more frequently than did male witnesses." *Id.* at 1653. This linguistic tentativeness has also been viewed as a result of women's taking "socio-emotional" roles. *Id.* (citing BENT PREISLER, *LINGUISTIC SEX ROLES IN CONVERSATION* 203 (1986)). Nevertheless, it has also been noted that "'feminine' speech patterns [have been] at times put to the service of goals-directed activity." *Id.* (citing BENT PREISLER, *LINGUISTIC SEX ROLES IN CONVERSATION* 288 (1986)).

<sup>83</sup> Professor of Linguistics, Georgetown University.

For a critique and counter-response to some of Deborah Tannen's work, see Hayley Davis, *Theorizing Women's and Men's Language*, 16 LANGUAGE & COMM. 71 (1996) (criticizing the theory and methodology of DEBORAH TANNEN, *GENDER AND DISCOURSE* (1994)); Hayley Davis, *Gender, Discourse and Gender and Discourse*, 17(4) LANGUAGE & COMM. 353 (1997) (replying to Yerian); Keli Yerian, *From Stereotypes of Gender Difference to Stereotypes of Theory: A Response to Hayley Davis' Review of Deborah Tannen's Gender and Discourse*, 17(2) LANGUAGE & COMM. 165, 165-66 (1997) (criticizing Davis' review, on the basis that it "misrepresents Tannen's approach to language and gender research, obscuring common ground and inhibiting future dialogue on important issues in language and gender theory").

<sup>84</sup> TANNEN, *supra* note 67, at 76-77.

<sup>85</sup> *Id.* at 77.

<sup>86</sup> *Id.*

longer period of time and are more willing to interrupt.<sup>87</sup> In general contexts, there is a difference between the genders as to "topic control:" women are more likely to use expressions in support of a co-conversant's initiated topic; men are more willing to direct control over the topic of conversation.<sup>88</sup> Men also tend to use "highly intense language" in their attempts to persuade,<sup>89</sup> while women tend to use more "disclaimers."<sup>90</sup> Moreover, women tend to feel "less confident in their ability to influence" others.<sup>91</sup> This diminished confidence may put women at a disadvantage, because "[t]hose individuals who begin bargaining encounters with greater confidence and higher aspiration levels tend to attain more favorable agreements."<sup>92</sup> Despite the apparent disparities in negotiation styles, some researchers have noted that

---

<sup>87</sup> Craver & Barnes, *supra* note 67, at 310. In contexts other than negotiation settings, it has been noted that "although women are perceived to talk more than men, men usually were more talkative in examined, formal interactions. When women in relatively formal settings spoke half as much as men, they were perceived as dominating the conversation." Davis, *supra* note 37, at 1648. *See also id.* at 1649 (noting "some researchers have found interruptions to occur with strikingly disproportionate frequency in male speech directed at women").

In an interesting study of interactions between male and female doctors and patients, researcher Candice West found that "male doctors were responsible for 67% of all interruptions, and patients were responsible for 33%. When the doctor was female, patients were responsible for 68% of the interruptions, doctors for 32%." Davis, *supra* note 37, at 1650 (footnotes omitted). West concluded "'gender can have primacy over status;'" thus the attained status of medical doctor, if it influences communication between patients and doctors, is overwhelmed by the effects of the ascribed status of gender on the relationship. *Id.* (quoting Candice West, *When the Doctor Is a "Lady": Power, Status and Gender in Physician-Patient Encounters*, 7 SYMBOLIC INTERACTION 87, 102 (1984)).

Davis notes, however, that, similar to other studies cited herein, West's research did not establish a causal relationship between the doctor's gender and patient's interruptions: "West does not, however, purport to answer the question whether the more frequent interruption of female doctors signaled disrespect by patients or a choice by female doctors to yield authority in favor of being better listeners." *Id.*

<sup>88</sup> *Id.* at 1651.

<sup>89</sup> Craver & Barnes, *supra* note 67, at 313 (quoting Michael Burgoon et al., *Friendly or Unfriendly Persuasion—The Effects of Violations of Expectations by Males and Females*, 10 HUM. COMM. RES. 283, 284, 292 (1983)).

<sup>90</sup> *Id.* at 314.

<sup>91</sup> *Id.* at 311; Dianne Jenkins, *Let's Play the Negotiation Game!*, 3 WOMEN IN HIGHER EDUC. 4 (1994) (citing results of survey of 100 male and female administrators in Texas public schools, colleges and universities: 64% of men stated they "negotiated more with their supervisors and colleagues than with anyone else;" 64% of women stated they engaged in the less threatening behavior of negotiating with "subordinates, students[,] and family members" more than with anyone else).

<sup>92</sup> Craver & Barnes, *supra* note 67, at 313.



“[w]hen individuals are trained to perform a specific role, gender communication-behavior differences disappear.”<sup>93</sup>

Illustrative of the different communication styles men and women may exhibit is an observational study<sup>94</sup> of first year law students in New York University Law School's Lawyering Program conducted by Professor Peggy C. Davis.<sup>95</sup> Davis found differences between the communication styles of men and women in attorney-client roles.<sup>96</sup> The case study involved two attorney-client pairs: "Team A" was composed of a female attorney and a female client, and "Team B" had both a male attorney and client.<sup>97</sup> Davis found differences in how the men and women began their "opening narratives," controlled the conversation topic, interrupted, demonstrated talkativeness, expressed uncertainty or tentativeness, and made requests.<sup>98</sup> In particular, Team A was "less directive and more open to exploration of a range of possibly relevant concerns," while Team B was "more directive and more controlled by the attorney's early judgments about what was and was not relevant."<sup>99</sup> Davis noted that the clients for both teams talked the same amount of time; however, the Team B attorney tended to talk more than the attorney from Team A.<sup>100</sup> Both Team A client and attorney exhibited more

---

<sup>93</sup> *Id.* at 320 (quoting Nancy A. Burrell et al., *Gender-Based Perceptual Biases in Mediation*, 15 COMM. RES. 447, 464 (1988)).

<sup>94</sup> As Professor Davis' research was an observational case study of the exchanges of two pairs of students in attorney-client roles, the results cannot be generalized:

The research was not designed to support generalizations concerning the speech patterns of men and women functioning in the roles of-lawyer or client. Indeed, the data would not allow such a test, for there was no attempt to examine a sample of any size. The lessons of the analysis are interpretive and anecdotal, testing the value of close, hermeneutic study of two interactions and utilizing for their explanatory power categorizations that other scholars have associated with gender, class, and social status.

Davis, *supra* note 37, at 1657.

<sup>95</sup> Professor of Law, New York University.

<sup>96</sup> *Id.* at 1657-80.

<sup>97</sup> *Id.* at 1657.

<sup>98</sup> *Id.* at 1658-80.

<sup>99</sup> *Id.* at 1661. Again, the results of Davis' study are not conclusive: there can be no assurance of statistical significance without a randomized controlled experiment. See EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 242-43 (6th ed. 1992).

<sup>100</sup> Davis' results indicated that

[t]he Team B lawyer was responsible for a substantially higher proportion of talk than was the Team A lawyer. In introductions and parameter setting, the Team B lawyer spoke 92% of the time, the Team A lawyer, 85.4%. In elaborative dialogue, the Team B lawyer spoke 49.6% of the time, the Team A lawyer, 14.4%. In problem defining and synthesis, the Team B lawyer spoke 73.9% of the time, the Team A lawyer, 52.8% . . . . Indeed, the pattern of relatively greater Team B attorney

hesitation signs.<sup>101</sup> And while Team A and B attorneys used intensifiers with the same regularity, the Team B client used intensifiers more frequently than did the Team A client.<sup>102</sup> There was also a disparity in the number of hedges which the teams expressed: Team B used hedges more frequently than Team A.<sup>103</sup> Davis concluded that “the Team A lawyer facilitated a greater degree of contextual analysis and collaborative action, while the Team B lawyer facilitated quicker resort to legal categories and clearer separation of problem-solving and expert functions.”<sup>104</sup> Davis noted, however, that the Team A approach, although consistent with predicted outcomes of “feminine” discourse, could be interpreted in a positive light:

[T]he Team A attorney operates more consistently from an assumption of cooperation with what students of conversation describe as the maxim of relevance. That is, she operates with a presumption that everything the client says *is relevant*—that it makes sense in terms of norms that might be recognized in law, or in a more broadly conceived problem-solving context. The Team A attorney holds open the possible applicability of a variety of norms and therefore interferes less with the client’s ways of conceptualizing a problem.<sup>105</sup>

---

participation by segment held even in the solicited free form narrative, during which each client spoke at sufficient length to assure overall dominance in terms of quantity of talk. In that segment, the Team B attorney spoke 4.7% of the time; the Team A attorney did not speak.

*Id.* at 1663–64.

<sup>101</sup> In her study, Davis defined “hedges” as “[m]odifiers that make an assertion less certain or precise (for example, ‘I generally like ice cream’).” *Id.* at 1665 n.148. In addition, Davis identified hesitation signs such as “filled pauses” and “false starts.” *Id.* She found,

Hesitation signs occurred in the Team B transcript at a rate of 176.2 per 10,000 words for the attorney and at a rate of 836.6 per 10,000 words for the client. In the Team A transcript, they occurred at a rate of 106.5 per 10,000 words for the attorney and at a rate of 359.6 per 10,000 words for the client.

*Id.* at 1665.

<sup>102</sup> *Id.* at 1665–66. For purposes of this observation, “intensifiers” were defined as “[w]ords that intensify an utterance but add little or nothing beyond intensification to the meaning of the utterance and do not express certainty (for example, ‘That person is really tall’).” *Id.* at 1665 n.148.

<sup>103</sup> The Team B attorney and client used hedges 19.6 times and 106.8 times, respectively, per 10,000 words. The Team A attorney and client used hedges 16.6 and 71.0 times, respectively, per 10,000 words. *Id.* at 1666.

<sup>104</sup> *Id.* at 1676.

<sup>105</sup> *Id.* at 1678.

Davis' research is illustrative of the differences which have been found between men and women's communication styles.<sup>106</sup> Thus, while there is evidence which suggests that women and men communicate differently, further research is required to determine the impact of gender on the discourse of disputing parties in the setting of mediation.<sup>107</sup>

### B. *Gender and Negotiation Style*

There has been some research on women's and men's differing behavior in negotiation settings. For example, in a study of law students enrolled in a Legal Negotiating class at New York University School of Law, Professors Charles B. Craver and David W. Barnes found that a statistically significant number of women chose to enroll in the course on a credit/no-credit basis, suggesting that the women students may have been more risk averse than their male peers.<sup>108</sup> While this difference in gender was found, no statistically significant difference was noted in the overall performance of male and female negotiators.<sup>109</sup>

---

<sup>106</sup> For a survey of studies which report similar findings, see KAY E. PAYNE, *DIFFERENT BUT EQUAL: COMMUNICATION BETWEEN THE SEXES* 104–12 (2001).

It is noteworthy that some researchers have focused on the "social constructionist view" of gender and discourse:

[F]rom a social constructionist perspective, language is viewed as a set of strategies for negotiating the social landscape, an action-oriented medium in its own right. Because social constructionists conceptualize language as dynamic and fluctuating in response to speakers' goals and intentions in particular social circumstances and speech communities, they endorse the use of interpretive research strategies such as ethnomethodology, speech act analysis, and discourse analysis.

Mary Crawford, *Gender and Language*, in *HANDBOOK OF THE PSYCHOLOGY OF WOMEN AND GENDER*, *supra* note 12, at 228, 231.

<sup>107</sup> See Crawford, *supra* note 107, at 231 (stating, "[d]iscursive research, rather than focusing on differences per se, addresses the second question that has guided the field [of gender studies in communication]: How is inequality created and maintained in interaction? Proceeding from a discursive framework, we can ask interesting questions about how masculinity and femininity are construction—and resisted—through talk").

<sup>108</sup> Craver & Barnes, *supra* note 67, at 333 (finding "[i]n the aggregate group of 612 students, 26.7% of the 367 men and 38.8% of the 245 women opted for credit/no-credit").

<sup>109</sup> *Id.* at 334–35, 347 ("Read together, our findings suggest that while women and men may not perform identically in negotiation settings, there is no factual basis for assuming that women are weaker or less capable negotiators."). Performance in this study was measured by the outcome of the negotiation. *Id.*

A possible bias in Professors Craver and Barnes' study, however, is that the sample used was determined by self-selection, i.e., voluntary enrollment in the Legal Negotiating course which was studied. *Id.* at 323.

In a meta-analysis<sup>110</sup> of empirical studies which compared the behavior of women and men in various negotiation settings, researchers found "some, though limited, support" for the hypothesis that women are more cooperative than men in negotiations.<sup>111</sup> When the researchers moderated their statistical calculations to account for variables such as opponent's sex, whether real or confederate opponents were involved in the experiment, and the year of study,<sup>112</sup> results indicated that "where face-to-face communication is usually permissible and participants enact elaborate role-plays, women behaved less competitively than men."<sup>113</sup> Where bargaining required little face-to-face contact with the opponent, virtually no differences in competitiveness between men and women were found.<sup>114</sup>

In yet another study of law students in New York University Law School's Lawyering Program, researchers found that women law students were less confident than men in their abilities to negotiate.<sup>115</sup> A possible reason for women's comparative low self-confidence may be the perception of women that negotiation is a "male" task.<sup>116</sup> Nevertheless, men and women achieved comparable results in the simulated negotiation exercise.<sup>117</sup> Sandra R. Farber and Monica Rickenberg<sup>118</sup> additionally found that by modifying the negotiator's training to emphasize "strategic, narrative, interpersonal, and ethical concerns,"<sup>119</sup> gender gaps in ratings of ability were reduced.<sup>120</sup> In addition, the gender of the negotiator's partner affected the negotiator's attitude; Farber and Rickenberg found that same sex partners voiced greater

---

<sup>110</sup> A meta-analysis is a statistical combination of "several studies in different settings, with different designs, and of different quality." DAVID S. MOORE, *STATISTICS: CONCEPTS AND CONTROVERSIES* 97 (5th ed. 2001).

<sup>111</sup> Walters et al., *supra* note 17, at 20.

<sup>112</sup> *Id.* at 8-9.

<sup>113</sup> *Id.* at 20.

<sup>114</sup> *Id.* at 21. The authors noted that "it appears that even small variations in experimental conditions can eliminate these differences [based on gender] entirely, or more surprisingly, cause them to change direction." *Id.* at 23. This conclusion underscores the importance of conducting research in the setting of mediation, so that the effects of the conditions of the mediation setting on gender can be ascertained.

<sup>115</sup> Farber & Rickenberg, *supra* note 67, at 291-92.

<sup>116</sup> *Id.* at 283 (stating, "[w]omen have tended to feel less confident than men when the assigned task was perceived as drawing on 'male' abilities, but not when the task was more 'feminine' in nature").

<sup>117</sup> *Id.* at 292-93.

<sup>118</sup> Farber and Rickenberg were instructors in the Lawyering Program at New York University School of Law.

<sup>119</sup> *Id.* at 303.

<sup>120</sup> *Id.* at 294-97.

trust of each other.<sup>121</sup> Furthermore, the gender gap varied based on the role which the negotiator played; the authors suggested that this may be evidence that the power which the negotiator perceives himself or herself to possess may affect negotiator confidence.<sup>122</sup>

A distinction can be made between negotiator behavior and negotiator power.<sup>123</sup> That is, differences in negotiator behavior that are based on gender may have a different impact on the mediation than do differences in negotiator power: "[M]any supposed gender differences may be a consequence of the unequal distribution of power and status between men and women in organizational settings."<sup>124</sup> Indeed, it has been noted that power is "a better predictor of negotiation behaviors and outcomes than gender."<sup>125</sup> Nevertheless, a meta-analysis of studies measuring the negotiation behavior of men and women has indicated that a "significant, though small, difference[ ] exist[s] in the outcomes received by men and women in negotiations."<sup>126</sup> This difference in negotiation outcomes may account, in part, for less access for women to job benefits such as increased pay and promotions.<sup>127</sup> Differences in negotiation outcome may be influenced by various factors, such as the gender of the opposing party; differences in bargaining power; whether the mediation is integrative (i.e., the focus of the mediation is to "maximize joint gain and avoid zerosum tradeoffs"); and whether the mediation is conducted face-to-face or through an intermediary such as a computer.<sup>128</sup>

<sup>121</sup> *Id.* at 300-01.

<sup>122</sup> *Id.* at 298-300.

<sup>123</sup> Stuhlmacher & Walters, *supra* note 13, at 656-57.

<sup>124</sup> *Id.* at 657 (citing Robert Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. OF SOC. 965, 965-90 (1977)).

<sup>125</sup> *Id.* (citing Carol Watson, *Gender Versus Power as a Predictor of Negotiation Behavior and Outcomes*, 10 NEGOTIATION J. 117, 117-27 (1994)); see also Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 HAMLINE J. PUB. L. & POL'Y 211, 229 (1999) (stating, "[t]he measure of greater power is the positive alternatives (court outcomes primarily) and the relative dependency of the weaker party on agreement. Corporate parties tend to have better court outcomes because the laws have been structured to affirm their rights according to rules they knew beforehand").

<sup>126</sup> Stuhlmacher & Walters, *supra* note 13, at 668.

<sup>127</sup> *Id.* at 668-70 (finding that "even when male-female differences in performance ratings were very small (effect size of 1% of variance), lower promotion rates for women were obvious," and noting that differences in negotiation outcome may assist the creation of a "glass-ceiling," preventing women from achieving in the workplace).

<sup>128</sup> These were the "moderators" which Stuhlmacher and Walters considered, in addition to the year of the study, in their meta-analysis. *Id.* at 658-60.

Applying the results of general communication and negotiation studies to the setting of mediation, it appears that women may be less willing than men to enter into a mediation setting and less self-confident in the mediation setting, with greater willingness to voice their lack of self-confidence.<sup>129</sup> A woman's projection of lack of self-confidence, the studies above suggest, may come from both a perception of the mediation process as a "male" process, as well as a general predisposition to be more willing to communicate a lack of self-confidence<sup>130</sup> and perhaps be more conciliatory.<sup>131</sup> On a purely procedural level, although the disputing parties and the mediator himself or herself may *perceive* the parties as having been given equitable time to speak, in fact such a perception may be erroneous.<sup>132</sup> On a substantive level, gender may have an effect on the outcome of the mediation.<sup>133</sup> Given the principles of mediation, the onus is on the mediator to ensure procedural equity.<sup>134</sup> Gender effects may endanger the impartiality of the mediation process.

#### IV. THE POTENTIAL IMPACT OF GENDER ON THE MEDIATION PROCESS: THEORETICAL AND PRACTICAL CONSIDERATIONS

The studies discussed above suggest that gender may have a substantial impact on the mediation process. There is some support for the contention that the outcome of the mediation will vary dependent upon the parties' genders.<sup>135</sup> There is also an indication that the procedural missions of

---

<sup>129</sup> Craver & Barnes, *supra* note 67.

<sup>130</sup> See discussion *infra* Part III.

<sup>131</sup> Walters et al., *supra* note 17, at 20.

<sup>132</sup> Davis, *supra* note 37, at 1648-49.

<sup>133</sup> Stuhlmacher & Walters, *supra* note 13, at 673.

<sup>134</sup> The role of the mediator as a guardian of the procedural equity of the mediation process is specifically contemplated by the MODEL STANDARDS OF CONDUCT FOR MEDIATORS. See MODEL STANDARDS, *supra* note 41. As the face of the mediation process itself, the mediator is uniquely positioned to ensure, to the extent possible, equity in bargaining between the parties. See Grillo, *supra* note 19, at 1555-56; see generally STULBERG, *supra* note 46. Nevertheless, some safeguards can be implemented by administrators of mediation programs to ensure the process is perceived by the parties as granting equal footing between and among disputants. That is, as Weckstein proposes a mediator-conducted "orientation session," mediation administrators may also be able to provide such an orientation session to disputants. See Weckstein, *supra* note 25, at 560; discussion *infra* Part V.B.

<sup>135</sup> Stuhlmacher & Walters, *supra* note 13, at 673. But see, e.g., Craver & Barnes, *supra* note 67, at 317 (stating, "[d]espite the various factors that would support the theory that more competitive male negotiators should achieve more beneficial results than

mediation may be undermined by gender disparities.<sup>136</sup> In particular, if women are denied an opportunity to be heard in the mediation setting, then the principle of allowing the parties to fully determine the outcomes of their disputes may not be served.<sup>137</sup> In addition, the role of the mediator and the mediation process may not be serving the parties impartially.<sup>138</sup> Given the informality of mediation and the lack of procedural safeguards, some commentators have recommended abandoning mediation and pursuing traditional legal fora in certain circumstances.<sup>139</sup> While mediation certainly is not a panacea for all disputes, abandonment of mediation whenever the disputants are of different genders would be too drastic: mediation can benefit disputing parties, regardless of their gender.<sup>140</sup>

Professor Trina Grillo<sup>141</sup> has characterized the mediation setting as a "microlegal system," in which "an informal law" governs the interactions of the participants.<sup>142</sup> This "informal law" creates unconscious expectations of behavior, and when these expectations are not met, there are negative consequences: "What makes such norms distinguishable from the mere 'shoulds' of daily conversation is the presence of sanctions: additional communications which accompany the 'shoulds' and which punish the

---

female negotiators, empirical studies involving competitive interactions do not consistently substantiate this supposition").

<sup>136</sup> See, e.g., Weckstein, *supra* note 25.

<sup>137</sup> See discussion *supra* Part II.C.

<sup>138</sup> See discussion *supra* Part II.C.

<sup>139</sup> Delgado et al., *supra* note 57, at 1404. Indeed, the dangers of alternative dispute resolution processes are particularly apparent in cases of domestic violence. E.g., Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993). The process of mediation in cases of domestic violence may be "incompatible with the culture of battering because [of mediation's potential to] economically . . . coerce [ ] battered women into participating and ignore [ ] violence as a tool of coercion and control." *Id.* at 2171. In addition, an issue may be raised in some circumstances as to whether mediation undermines potential litigants' due process rights. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1091 (2000).

<sup>140</sup> The benefits of mediation are manifold: mediation is a voluntary and cooperative, rather than adversarial, process; the procedure is confidential; the parties may benefit from early exploration of settlement; creative resolutions may be developed; mediation may promote a continuing peaceful relationship between disputing parties; and parties can explore and assert their personal power by engaging in resolution of their own disputes. E.g., Harkavy, *supra* note 40, at 156-61 (discussing the "advantages of mediation in sexual harassment disputes"). See also Grillo, *supra* note 19, at 1547-48.

<sup>141</sup> Assistant Professor of Law, University of San Francisco.

<sup>142</sup> Grillo, *supra* note 19, at 1555-56.

deviant or reward the conformist.”<sup>143</sup> From this perspective, there is an even higher premium placed upon the mediation process itself to ensure procedural fairness to all participants:

Against this backdrop, mediation must be seen as a relatively high-risk process. To begin with, for most people it is a new setting. Its norms are generally not understood by the parties in advance, with the result that the parties are extremely sensitive to cues as to how they are supposed to act; they will look to the mediator to provide these cues.<sup>144</sup>

It is mediation's challenge, then, to determine if procedural inequities based on gender exist and to remedy them to the extent possible.

Absent procedural safeguards, mediation may be an inferior procedure to traditional litigation.<sup>145</sup> “Mediation lacks the institutional power-balancing safeguards that exist in the adversarial process when trained advocates seek to ‘level the playing field.’”<sup>146</sup> In a traditional litigation procedure, a party with less bargaining power than his or her opponent may be represented by an advocate—an attorney who can make arguments that the represented party may be unwilling or unable himself or herself to make.<sup>147</sup> In some circumstances, an attorney can also educate the judiciary, through the adversarial system as to the possible existence and consequences of power imbalances.<sup>148</sup>

The informality of mediation and other dispute resolution processes has been cited as the primary criticism of dispute resolution processes: “[I]nformalism inhibits social change by persuading disputants with legitimate grievances to sacrifice their grievances in the interests of peace and cooperation. Informalism ‘presupposes a high degree of normative consensus on the substantive norms that control behavior outside the legal system.’”<sup>149</sup> Consequently, informalism may perpetuate the superior social status of those bargaining with power.<sup>150</sup> Nevertheless, safeguards can

---

<sup>143</sup> *Id.* at 1556.

<sup>144</sup> *Id.*

<sup>145</sup> See, e.g., Madeleine B. Simborg & Joan B. Kelly, *Beware of Stereotypes in Mediation*, FAM. ADVOC., Summer 1994, at 69, 69.

<sup>146</sup> *Id.*

<sup>147</sup> See *id.*

<sup>148</sup> *Id.*

<sup>149</sup> Delgado et al., *supra* note 57, at 1392 (quoting Abel, *Delegalization*, in ALTERNATIVE RECHTSFORMEN UND ALTERNATIVEN ZUM RECHT, JAHRBUCH FÜR RECHTSSTOZIOLOGIE UND RECHTSTHEORIE 40 (H. Von Erhard, Blankenburg, E. Klause & H. Rottluthner eds., 1980)).

<sup>150</sup> *Id.*



transform the informal process of mediation into a process that can provide the disputing parties opportunities to develop their communication skills and individual bargaining power.<sup>151</sup>

If mediation is procedurally inferior to traditional litigation with respect to gender disparity, the question then becomes, how can the *process* of mediation be remedied? However, even if mediation is not inferior to traditional litigation in ensuring procedural gender equity, determining the impact of gender on mediation will serve the values of mediation.<sup>152</sup> As the most visible and instrumental authority in the mediation setting, the mediator is in a prime position to ensure procedural parity between the disputing parties.<sup>153</sup> Of primary importance is mediation's value of self-determination:<sup>154</sup> the mediator must "remind the parties that the process will not succeed unless both of them are satisfied with the procedure and the result."<sup>155</sup>

To ensure procedural fairness, the mediator may be called upon to take a more active role in educating the parties, providing them information, and ensuring that, when one party concedes, he or she can articulate the reason or reasons for concession.<sup>156</sup> "By educating both parties about altering and adjusting their roles, the mediator may help them to see things from the other's point of view."<sup>157</sup> Moreover, by ensuring that the parties are not merely acquiescing because of disparities in bargaining power, the mediator can assist the parties in obtaining a lasting, durable agreement.<sup>158</sup> By taking a more active role, the mediator can assess whether a particular dispute is in fact appropriately mediated.<sup>159</sup> The mediator must, therefore, "be aware of a potential power imbalance in mediation. The[ ] sources [of power imbalance] include cultural and societal stereotypes, the history and dynamics of the relationship between the parties, personality and character traits, cognitive styles and capabilities, knowledge, economic sufficiency, and gender and age

<sup>151</sup> Mediation, thus, can be conducted under the "transformational model," allowing the parties to develop interpersonally as they resolve their dispute. See David Maxwell, *Gender Differences in Mediation Style and Their Impact on Mediator Effectiveness*, 9 MEDIATION Q. 353, 355 (1992).

<sup>152</sup> See MODEL STANDARDS, *supra* note 41; discussion *supra* Part II.

<sup>153</sup> See Simborg & Kelly, *supra* note 145, at 69-70.

<sup>154</sup> Weckstein, *supra* note 25, at 508. See also, MODEL STANDARDS, *supra* note 41.

<sup>155</sup> Simborg & Kelly, *supra* note 145, at 69.

<sup>156</sup> *Id.*; see also Weckstein, *supra* note 25, at 511.

<sup>157</sup> Simborg & Kelly, *supra* note 145, at 70.

<sup>158</sup> See *id.* at 69. For a study addressing mediation's ability to achieve durable settlements, see Meierding, *supra* note 65.

<sup>159</sup> See *id.* at 70 (stating that "[t]he mediator needs to know when to terminate mediation and refer the clients back to their respective attorneys").

differences.”<sup>160</sup> Indeed, a “passive, laissez-faire mode of mediation is more likely to produce a result that favors the more powerful.”<sup>161</sup> A successful mediation can then be defined as one, not where settlement was reached,<sup>162</sup> but where the parties had an equal chance of having their voices heard.<sup>163</sup> Where this is not possible, the parties should be encouraged to pursue resolution through other means which may provide more procedural safeguards.<sup>164</sup> Thus, given the informality of the mediation process, gender disparity may go unchecked, absent safeguards which an “activist” mediator may seek to address directly.<sup>165</sup> For example, while a “traditional” mediator

---

<sup>160</sup> *Id.* (citing Joan B. Kelly, *Power Imbalance in Divorce and Interpersonal Mediation: Assessment & Intervention*, 13 *MEDIATION Q.* 85 (1995)).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> It has been noted that, in settings where “integrative bargaining” rather than “distributive bargaining” is promoted, women in general may achieve more equitable treatment. Maxwell, *supra* note 151, at 355 (noting “transformational mediators,” those willing to employ mediation to redefine the disputing parties’ relationships, may promote “more equitable distribution of power” between the disputing parties); Stuhlmacher & Walters, *supra* note 13, at 659. “Distributive bargaining is a process whereby each party attempts to maximize its own share in a context of fixed-sum payoffs.” Maxwell, *supra* note 151, at 355. Alternatively, “[I]ntegrative bargaining is a process whereby parties attempt to increase the size of the joint gain *without* respect to the division of the payoffs.” *Id.* By presenting the mediation session as an integrative process, the mediator may help level bargaining power between disputants of different genders. Stuhlmacher & Walters, *supra* note 13, at 659 (stating that, if women’s bargaining ability improves in settings where integrative bargaining is required, “women would tend to achieve better agreements when integrative rather than distributive outcomes are possible, and worse settlements where a purely competitive strategy is required. In negotiation tasks that have integrative potential, less stereotypical differences in outcomes are expected than in distributive negotiation tasks . . .”).

<sup>164</sup> Simborg & Kelly, *supra* note 145, at 70.

<sup>165</sup> Weckstein, *supra* note 25, at 504–09. In this context, an “activist” mediator may be defined as a mediator who employs either a liberal “norm-educating” or “norm-advocating” model:

The norm-educating model assumes that knowledge of relevant social norms is a precondition to autonomous decision making. Thus, the mediator attempts to assure that disputants are aware of information concerning applicable law and other relevant data. Norm-educating mediators, however, may differ in the proper method of communicating this information to the parties. Many suggest that each party consult appropriate legal or expert counsel. If the parties do not follow this advice, some mediators go further and supply the relevant information themselves.

In the norm-advocating model, the mediator seeks party agreement within the boundaries of predetermined social norms, such as environmental codes, antidiscrimination statutes, or child support guidelines. . . . [T]he norm-advocating mediator evaluates proposed resolutions in terms of their conformity to the standards

may not "remove identified options from consideration simply because those options conflict with existing social norms,"<sup>166</sup> an activist mediator may take it upon himself to educate the parties as to existing social and legal norms.<sup>167</sup>

Nevertheless, the prospect of increased mediator activism is not without dangers. For example, Professor Donald T. Weckstein<sup>168</sup> provides an activist mediator's description of his approach to mediation.<sup>169</sup> When discussing his willingness to consider and suggest an appropriate basis for settlement, "the mediator states: 'I'm talking about what is salable: the settlement I have a realistic chance of persuading both sides to accept.' . . . He was only trying to help the parties reach the outcome that their relative bargaining strength warranted, far more efficiently than they could have if left to their own devices."<sup>170</sup> While the mediator Weckstein described employed his activism in a labor mediation,<sup>171</sup> where presumably the parties are experienced negotiators, a general application of such mediator activism would be fraught

---

advocated. The norm-educating mediator recognizes the importance of external standards but, unlike the norm-advocating mediator, will not necessarily recommend their application to the particular dispute, or test proposals by their conformance with such standards.

*Id.* at 506-07 (citing Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 734-35 (1996)). The traditional, "norm-generating," mediator is "inattenti[ve] to social norms":

In an effort to spur innovative problem-solving, the model situates party discussion in a normative tabula rasa. The only relevant norms are those the parties identify and agree upon. As Lon Fuller has explained, traditional or norm-generating mediation 'is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.'

Waldman, *supra* note 15, at 718-19 (quoting Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971)). Nevertheless, "[i]nterventions that challenge the central premises and goals of traditional mediation have become part of mainstream practice." *Id.* at 704.

<sup>166</sup> Waldman, *supra* note 15, at 718.

<sup>167</sup> *Id.* at 723-38. The example provided by Professor Waldman is that of the norm-educating mediator in a divorce dispute: the mediator employs "the full panoply of mediative techniques" employed by a "traditional" (or "norm-generating" mediator); however, the mediator's "approach differed . . . in her reference to relevant social and legal norms, which she used to provide a baseline framework for discussion of disputed issues." *Id.* at 730. In this example, the mediator explains to the disputing parties what current psychological research suggests as to the most beneficial custody schedules for children, and the mediator also informs the parties as to the ownership interests of wives in their husband's professional degrees. *Id.* at 728-29.

<sup>168</sup> Professor of Law, University of San Diego.

<sup>169</sup> Weckstein, *supra* note 25, at 516-17.

<sup>170</sup> *Id.* at 517 (quoting SAM KAGEL & KATHY KELLY, *THE ANATOMY OF MEDIATION: WHAT MAKES IT WORK* 59, 142 (1989)).

<sup>171</sup> *Id.* at 514-19.

with potential inequities. To predicate mediator activism on an assessment of the parties' bargaining strengths would ostensibly further the disparity between gender at the mediation table.<sup>172</sup>

However, by incorporating an ethic of gender equity into mediation, a mediator can be expected to maintain an activist approach, when warranted, without sacrificing the principle of self-determination:

A mediator, like other professional practitioners, is obligated to subordinate his or her own interests to that of the parties served—subject only to the overriding interest of the profession's social function. Pursuant to this professional obligation, in certain circumstances, the mediator's role to assure the disputant's informed self-determination would ethically justify a greater degree of activist intervention. Among the circumstances favoring enhanced interventions are: (1) when the parties request their use or appear to need or expect activist assistance from the mediator, and (2) when the dispute resolution context calls for accountability by the mediator to third parties or overriding legal principles.<sup>173</sup>

By the mediator's taking on a norm-educating, or, in some circumstances, a norm-advocating role, the mediator can actively ensure the parties' discussions and ultimate agreement comply with social and legal norms.<sup>174</sup> Thus, the overriding legal principle, or social norm, to be adopted by the mediator is that the disputing parties, despite gender and other differences, are entitled to equitable treatment in the mediation process. Mediation can consequently provide procedural safeguards and still remain a viable alternative to traditional litigation.<sup>175</sup>

As Professor Ellen A. Waldman<sup>176</sup> has advocated, a "multiple model approach" can be adopted: as disputes dictate, a mediator can flexibly

---

<sup>172</sup> Weckstein has noted that the different "classifications" of mediators, i.e., norm-generating, norm-educating, and norm-advocating, "explicitly recognize that some models . . . predominate in specific types of disputes or mediations administered by certain classes of institutional providers." *Id.* at 507. Thus, an adequate resolution to the issue of disparity based on diversity of disputing parties may need to address the setting in which the parties mediate their disputes. *See id.* at 514–27 (describing the various predilections of several institutions in using an activist approach).

<sup>173</sup> *Id.* at 559.

<sup>174</sup> Waldman, *supra* note 15, at 738, 745.

<sup>175</sup> *See* Delgado et al., *supra* note 57, at 1404 (stating that, while some grievances must be "direct[ed] . . . to formal court adjudication . . . [i]n those areas in which the risk of prejudice exists, but is not so great as to require an absolute ban, checks and formalities must be built into ADR to ameliorate these risks as much as possible").

<sup>176</sup> Associate Professor of Law, Thomas Jefferson School of Law.

employ various degrees of intervention.<sup>177</sup> In some instances, for example, for "conflicts in which the goals of enhancing disputant autonomy and preserving relationships are paramount," the disputants should be allowed to define their own values and norms.<sup>178</sup> In other contexts, "where party autonomy and relational concerns are preeminent," yet "application of social or legal norms is possible, conclusive, and relatively compelling," the mediator should be allowed to advise the parties as to legal and social norms.<sup>179</sup> In addition, where "disputes . . . require application of a normative framework, but present gray areas within that framework for negotiation,"<sup>180</sup> the mediator may go so far as to "insist[ ] on . . . [legal and social norms]' incorporation into the agreement."<sup>181</sup> There are no clear standards: "Mediation is not a 'one-size fits all' process; it cannot be guided by a 'one-size-fits all' code."<sup>182</sup> However, if the dispute resolution process is undertaken by the mediator with the social norm in mind of ensuring equity in bargaining power, the democratic value of the process can be served.

While different models for mediator conduct may be appropriate in different settings,<sup>183</sup> when disputing parties of different genders are involved, the mediator is warranted in taking on a more active role.<sup>184</sup> Specifically, the mediator is warranted, to varying degrees, in pursuing an evaluative role.<sup>185</sup> Thus, the mediator may "reality test" a proposed resolution, questioning the

---

<sup>177</sup> Waldman, *supra* note 15, at 709–10. Indeed, Waldman suggests that, to varying degrees, such a "multiple model description" suits current meditative techniques. *Id.* at 704.

<sup>178</sup> *Id.* at 720.

<sup>179</sup> *Id.* at 738.

<sup>180</sup> *Id.* at 755.

<sup>181</sup> *Id.* at 745.

<sup>182</sup> *Id.* at 768.

<sup>183</sup> Weckstein, *supra* note 25, at 507.

<sup>184</sup> See Simborg & Kelly, *supra* note 145, at 70.

<sup>185</sup> See Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO THE HIGH COST OF LITIG. 111, 111 (1994) (defining an "evaluative mediator" as one who "assumes that the participants want and need the mediator to provide some direction as to the appropriate grounds for settlement—based on law, industry practice or technology"). Weckstein proposes incorporating this evaluative predisposition into codes of ethics and practices. Weckstein, *supra* note 25, at 559–60. Marjorie Corman Aaron advocates a perhaps more conservative use of evaluative technique: the mediator should adopt an evaluative model "only where widely divergent participant evaluations or lack of any evaluative effort on one side or the other is a major barrier to settlement." Marjorie Corman Aaron, *Evaluation in Mediation*, in GOLANN, *supra* note 23, at 267, 272. Aaron discusses evaluative techniques with the presumption that "the mediator has tried to address every other major barrier . . . preferably before an evaluation commences." *Id.*

parties as to whether or not a proposed settlement suits the parties' wishes; make predictions as to the outcome of the resolution; and advise the parties.<sup>186</sup> Using these techniques with care, the mediator can employ mediation for its "transformational" potential: mediation itself can be used as a vehicle to "redefine relationships and empower those who lack power."<sup>187</sup> Prudent use of such techniques may require the mediator to conduct an "orientation session," in which the mediator would provide an introduction to the mediation process and ensure the parties understand their power to "veto" a proposed resolution; in addition, the mediator could hold off using an evaluative technique until the "timing" was appropriate (for example, in caucus, as opposed to joint session).<sup>188</sup> Like the mediator in cross-cultural disputes, the mediator in cross-gender disputes can assist the parties in recognizing, even on an unconscious level, that their bargaining styles, although different, can be accommodated and given effect in the mediation setting.<sup>189</sup>

#### V. ASSESSING GENDER DISPARITY IN MEDIATION: FASHIONING A RESEARCH DESIGN MODEL

The goal of designing a research model which can assess unconscious interactions, based on gender, in the mediation process,<sup>190</sup> can be challenging given the nature of mediation. Nevertheless, a research model can be developed which can address the causes and possible solutions for gender disparity in mediation.<sup>191</sup>

---

<sup>186</sup> Weckstein, *supra* note 25, at 558–59.

<sup>187</sup> Maxwell, *supra* note 151, at 355.

<sup>188</sup> Weckstein, *supra* note 25, at 560–62.

<sup>189</sup> See, e.g., Walter A. Wright, *Cultural Issues in Mediation: Individualist and Collectivist Paradigms*, available at <http://mediate.com/articles/wright.cfm> (last visited Sept. 3, 2001).

This discussion as to discretionary use of evaluative techniques presupposes, however, that mediators are familiar with the potential of disparity based on gender. See discussion *infra* Part V.B. In addition, although beyond the scope of this Note, questions of mediator qualifications and certification, as well as standards for ethics in mediation, are raised. See generally, Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723 (1996); Waldman, *supra* note 15.

<sup>190</sup> See discussion *infra* Part V.A.

<sup>191</sup> See discussion *infra* Part V.B.

### A. *The Challenges of Research in Mediation*

Mediation and other dispute resolution mechanisms are unique in their informality.<sup>192</sup> There is little that a mediator can predict in the way of the parties' interactions.<sup>193</sup> While a traditional court proceeding generally will have had its issues fleshed out prior to trial or hearing, a mediator may not know what the dispute between the parties is prior to their taking their seats at the mediation table. Similarly, the "spontaneous"<sup>194</sup> nature of mediation can pose challenges for a researcher. There are numerous variables—internal and external—which can influence the disputing parties in the mediation setting.<sup>195</sup> These are potential "lurking variables" which can make elusive an accurate assessment of gender's effects.<sup>196</sup>

Generally, the mediation session remains a confidential matter among the disputing parties and the mediator himself or herself. Indeed, the *Model Standards of Conduct for Mediators* enunciates this principle:

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.<sup>197</sup>

While the parties may agree otherwise, the mediation generally begins on the presumption that what the parties say remains confidential. With such a principle, research of the mediation process becomes more challenging. Nevertheless, the *Model Standards* provide that

Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible

---

<sup>192</sup> *E.g.*, Delgado et al., *supra* note 57, at 1361–67 (providing overview of "informal" ADR processes).

<sup>193</sup> *See* STULBERG, *supra* note 46, at 67 ("Once a mediator has concluded his opening remarks, what happens next is spontaneous. The mediator has very little idea what he is about to hear or what options exist. He does not know where the discussion will lead . . . . The mediator is like an orchestra conductor who is directing a group of musicians who are improvising their music rather than playing a composed work.").

<sup>194</sup> *Id.*

<sup>195</sup> *See* discussion *infra* Part V.B.

<sup>196</sup> *See generally* MOORE, *supra* note 110, at 73 (defining "lurking variable" as a "variable that has an important effect on the relationship among the variables in a study but is not one of the explanatory variables studied").

<sup>197</sup> MODEL STANDARDS, *supra* note 41.

persons. Under appropriate circumstances, researchers may be permitted to obtain access to the statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.<sup>198</sup>

Without randomized, comparative experiments, researchers are left with less generalizable research models, such as observational studies and one-track experiments.<sup>199</sup> While much of the research outlined above has taken the form of observational studies and one-track experiments in negotiation settings, there has been little experimentation as to the issue of gender in mediation. What is needed in this body of literature is a research model designed to assess causality.<sup>200</sup>

As a practical matter, however, it is difficult to measure the effect of gender on the process and outcome of mediation. One fundamental concern is whether the research conditions are realistic.<sup>201</sup> Although an observational study may be more practical, it may indicate less as to the effect of gender on the mediation process than a replicable experiment, which can be generalized to a wider population.<sup>202</sup>

### B. A Proposed Experimental Model

A proposed experimental model can not only assess the potential impact of gender on the mediation process, but can also assess the efficacy of potential remedies such as training the mediator and the parties as to the potential for gender disparity and mediation's goals of self-determination and impartiality.

The research done to date suggests several factors to be assessed in mediation settings: 1) willingness to engage in mediation; 2) aversion to risk

---

<sup>198</sup> *Id.*

<sup>199</sup> MOORE, *supra* note 110, at 73–78.

<sup>200</sup> *Id.* The irony in recognizing that scientific method can be relied upon to assess the underpinnings of contextual disparity is facially at odds with a contextualist perspective. For example, Grillo has noted that “[t]raditional western adjudication . . . ‘aspires to science: to the immanent generalization subsuming the emergent particularity, to prediction and control of social regularities and regulations.’” Grillo, *supra* note 19, at 1556–57 (quoting Catharine A. Mackinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635, 655–56 (1983)).

<sup>201</sup> MOORE, *supra* note 110, at 97 (“When experiments are not fully realistic, statistical analysis of the experimental data cannot tell us how far the results will generalize.”). Thus, although studies of students in a negotiation class may be helpful, they may not be generalizable to a greater population—those involved in mediation. See BABBIE, *supra* note 100, at 241–42.

<sup>202</sup> See MOORE, *supra* note 110, at 12–13.



(which may affect willingness to engage in mediation); 3) outcome of mediation (i.e., whether the settlement was favorable to one party over another); 4) perception of competence and success in mediation; 5) the race and ethnicity of the disputing parties; 6) the age of the disputing parties; 7) the role of the disputing parties (i.e., whether they are consumers or merchants; employers or employees); 8) the relationship between the parties; 9) the "interpretation and meaning of conflict to the parties;"<sup>203</sup> 10) the gender of principals and agent-negotiators; 11) the social status of the disputing parties; 12) the parties' expectations and goals in mediation; 13) the parties' feelings about mediators and agents; 14) the motivation of the parties to settle; 15) willingness to concede; 16) communication of lack of confidence; 17) perception of mediation as a "feminine" or "masculine" endeavor; 18) perception of power (i.e., the degree to which a disputing party perceives his or her legal and moral position to be strong); and 19) gender, age, and race of the mediator.<sup>204</sup> These are all factors which should be measured in any experiment on gender disparity in mediation.

While these are among the variables that have been and should be further considered in research on mediation,<sup>205</sup> there is the more probing question as to causality: how do women's experiences in mediation vary based on alternative treatment variables—hypothesized remedies to any potential gender disparity?<sup>206</sup> Asking this question may not only lead to research which can accurately assess gender disparity in mediation, but may also instigate further studies which can begin to determine how to remedy any disparity which may exist.

### 1. *Effects of Mediator Education and Intervention*

Grillo has noted that the "microlegal system" of mediation puts greater emphasis on the mediator to provide the disputing parties with indications of how they should behave in mediation.<sup>207</sup> Thus, a likely treatment variable is

---

<sup>203</sup> Stamato, *supra* note 4, at 378.

<sup>204</sup> *Id.* See also Maxwell, *supra* note 151, at 358–63 (reporting results of study indicating that male and female mediators differ in production of "effective," i.e., durable, settlements).

<sup>205</sup> Stuhlmacher and Walters suggest additional variables serve as "moderators" to gender differences: gender of the opposing disputing party; "power differences in negotiation situation"; whether the negotiation is integrative or distributive, *see* discussion *infra* note 128; and "communication mode" (hypothesizing that "constraints on communication would decrease the likelihood of stereotypical differences"). Stuhlmacher & Walters, *supra* note 13, at 659.

<sup>206</sup> See, e.g., BABBIE, *supra* note 99, at 36.

<sup>207</sup> Grillo, *supra* note 19, at 1556.

education of the mediator. Indeed, advocating greater mediator activism as a means to achieve gender equity may be meaningless without an established common understanding of the potential for gender disparity in the mediation setting.<sup>208</sup> Thus, the question to be addressed is, if the mediator is knowledgeable of issues of gender disparity and conducts the mediation in a manner consistent with this knowledge, does the mediation process become more equitable? Ostensibly, a program designed to increase mediator awareness of different gender communication and behavior styles can make conscious that which otherwise unconsciously affects the parties at the "microlegal" level.

Thus, the mediator, as a third party to the dispute resolution process, can be trained to be aware of potential bargaining disparities on the basis of gender or other factors such as race and socioeconomic status.<sup>209</sup> Deborah M. Kolb<sup>210</sup> has proposed a model for training students of negotiation as to the effects of gender in negotiation.<sup>211</sup> Kolb stresses that her method of training students is undertaken from the perspective of the "valuing difference model."<sup>212</sup> That is, rather than focusing on gender as a "deficit," with an emphasis placed on "the skills that men have and women lack,"<sup>213</sup> she values gender differences and the potential they provide for "articulating a woman's point of view that brings heretofore unnoticed benefits to the negotiation process."<sup>214</sup> Kolb thus proposes a training model which treats gender as a varying, rather than a "fixed," trait.<sup>215</sup> In so doing, Kolb states "the goal [of training] is to heighten awareness of the factors that shape how gender gets mobilized in negotiation settings and help students see what choices they have in the roles and positions they take up."<sup>216</sup> The methods used in such training include role-plays, where "students [can] see how gender stereotypes can play out in a negotiation,"<sup>217</sup> calling attention to gender-specific behavior used "sometimes unconsciously, but often strategically, to gain the upper

---

<sup>208</sup> See discussion *supra* Part IV.

<sup>209</sup> Kolb, *supra* note 59, at 354.

<sup>210</sup> Professor, Simmons College Graduate School of Management; Codirector, Simmons Center for Gender in Organizations.

<sup>211</sup> Kolb, *supra* note 59, at 349-54.

<sup>212</sup> *Id.* at 348.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 350; see also Carrie Menkel-Meadow, *Teaching About Gender and Negotiation: Sex, Truths, and Videotape*, 16 NEGOTIATION J. 357, 361 (2000) (stating, "the significance of gender might change within any interaction itself").

<sup>216</sup> Kolb, *supra* note 59, at 350.

<sup>217</sup> *Id.* at 351.

hand;"<sup>218</sup> and teaching, through the use of written text or video, "turning moves," which "disrupt or resist a dominance-deference pattern."<sup>219</sup> Kolb's training model can be modified to apply to mediators. Through instruction by means of literature and videotape, the mediator can be trained to foster an integrative mediation process<sup>220</sup> and "pay[] attention to 'problematic moments'" where gender disparity may be addressed.<sup>221</sup>

Likewise, Carrie Menkel-Meadow<sup>222</sup> proposes strategies for teaching students of negotiation about potential gender disparities.<sup>223</sup> Menkel-Meadow proposes that those teaching negotiation: (1) "[r]ecognize that gender and gender theory is itself dynamic and changing;" (2) "read gender theory literature and empirical scholarship;" (3) "[t]alk about gender issues pervasively and in context (along with other similar topics);" (4) "[a]ssign some of the research studies and rigorous theory for class discussion;" (5) "[e]xplore the contradictions and complexity in the material;" (6) "[e]xplore gender issues in simulations and videotaped illustrations of negotiations as part of the agenda of debriefing and discussion;" (7) "[e]ncourage students to explore their own questions and issues about gender roles in negotiation;" (8) "[b]e aware of [their own] 'gender' power;" and (9) "[c]onsider what [their] teaching goals are."<sup>224</sup> Mediators, mediation programs, and those fashioning mediator training and qualification standards can utilize these proposed methods to educate themselves and third parties as to the potential of gender disparity in the mediation setting and possible methods for ameliorating disparity in bargaining power.<sup>225</sup> In an empirical study, these training

<sup>218</sup> *Id.* (citing KOLB & WILLIAMS, *supra* note 5, at 105–06, 262 n.2).

<sup>219</sup> *Id.* at 351–52 (citing SILVIA GHERARDI, *GENDER, SYMBOLISM, AND ORGANIZATIONAL CULTURE* (1996)). An example of a "dominance-deference pattern" is interruption. *Id.* at 352. While Kolb notes that not all "dominance-deference patterns" are gender-specific, many are. *Id.*

<sup>220</sup> *See id.* at 353.

<sup>221</sup> *See id.* at 354.

<sup>222</sup> Professor of Law, Georgetown University Law Center.

<sup>223</sup> Menkel-Meadow, *supra* note 215, at 364–66.

<sup>224</sup> *Id.*

<sup>225</sup> Thus, the mediator's mode of intervention may be an additional factor for study. It is expected that the mediator "can help a negotiator discover areas of potential bargaining power that have been overlooked or can suggest or even assist in finding ways to utilize that potential." Alvin L. Goldman, *Comparative Analysis of Labor Mediation Using a Bargaining Strength Model*, 82 KY. L.J. 939, 957 (1993). The "bargaining strength" conception of mediation purports that the bargaining powers of disputing parties are conditioned upon each party's perception of bargaining power. *Id.* at 941. Thus, a mediator who undertakes mediation from the "bargaining strength" model may be more willing to assist the parties to "alter [their] relative bargaining strengths," thereby promoting the likelihood of settlement. *Id.* at 957. Such an interventionist strategy may be

techniques can be employed to determine the efficacy of such mediator training on mediation outcomes and behavior of disputing parties.

## 2. *Effects of Educating the Disputing Parties*

The recent work of Deborah M. Kolb and Judith Williams directly suggests that training women to negotiate can result in reduced disparity in negotiation behavior and outcome between the genders.<sup>226</sup> From their interviews with women, Kolb and Williams identified a process of "parallel negotiation," which they termed "shadow negotiation."<sup>227</sup> The shadow negotiation consisted of two simultaneous levels of interaction between negotiators: on one level, the parties bargained as to the substance of their dispute; on the other level, the parties carry on "nonverbal and masked" bargaining as to how they would conduct themselves in the negotiation setting.<sup>228</sup> Thus, the goal of Kolb and Williams is to shed light on these elusive shadows of negotiation to achieve greater equity:

[W]henver gender insinuates itself into the shadow negotiation, we can take steps to lessen the impact. As empowered advocates *and* connected negotiators, we can move to bring other people's perceptions into alignment with our sense of who we are and what we want to accomplish. The job at hand for any woman negotiating is to be aware of these perceptions and to manage them actively.<sup>229</sup>

Consistent with Kolb's and Williams' recommendations, disputing parties, and women in particular, involved in mediation can be trained to mediate their disputes by uncovering the "shadow" agendas which would otherwise prevent them from effectively advocating their positions.<sup>230</sup>

Likewise, from a social-psychological model of discrimination, it is expected that "prejudiced persons [will be] least likely to act on their beliefs if the immediate environment confronts them with the discrepancy between their professed ideals and their personal hostilities against out-groups."<sup>231</sup> As

---

categorized by Waldman as a "norm-educating," or, in some circumstances, a "norm-advocating," role. Waldman, *supra* note 15, at 741-45. While such interventions are of increasing use, they may, to some traditional mediators, be unpopular. *Id.* at 704-05.

<sup>226</sup> KOLB & WILLIAMS, *supra* note 5, at 31.

<sup>227</sup> *Id.* at 20-21.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 31 (footnote omitted).

<sup>230</sup> See Kolb, *supra* note 59, at 350; see also, Menkel-Meadow, *supra* note 215, at 364-66.

<sup>231</sup> Delgado et al., *supra* note 57, at 1387.

Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee, and David Hubbert noted,

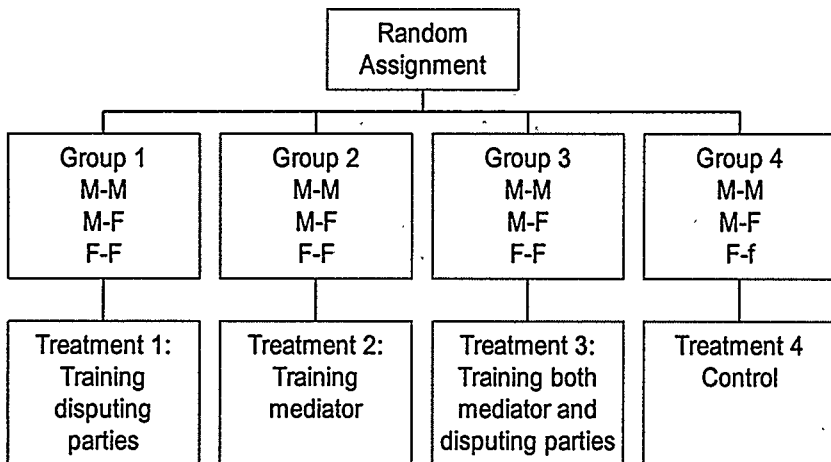
The selection of one mode or another of dispute resolution can do little, at least in the short run, to counter prejudice that stems from authoritarian personalities or historical currents. Prejudice that results from social-psychological factors is, however, relatively controllable. Much prejudice is environmental—people express it because the setting encourages or tolerates it. In some settings people feel free to vent hostile or denigrating attitudes toward members of minority groups; in others they do not.<sup>232</sup>

Thus, education of the disputing party in a position of power may assist in lessening gender disparity: the aim of such education would be to enforce the tenet of mediation as a self-determinative dispute resolution process, one in which all parties, despite their bargaining power, are allowed to speak and are heard.

A proposed model, thus, is one in which both mediator and disputing party education are primary variables, with lurking variables such as mediator gender, age, and socioeconomic status, measured to assess interaction effects.<sup>233</sup> To obtain results which may be generalized to wider

<sup>232</sup> *Id.* (citations omitted).

<sup>233</sup> A simple depiction of such a design would include two treatment variables, with randomized matched assignments into four separate groups:



In this diagram, participants in all experimental groups would be matched on potential lurking variables such as age and socioeconomic status. *See, e.g., BABBIE, supra* note 99, at 242–44. The responses of all four groups could then be compared to determine any effects training of the mediator or the disputing parties may have had on mediation behavior or outcomes. This model would require a large number of subjects. MOORE,

populations, a sample of subjects can be chosen from court-connected, administrative, and private mediation programs.<sup>234</sup> Pretesting of the subjects should occur, so that the groups of subjects can be "matched" by potential lurking variables.<sup>235</sup> For example, participants in the study can be categorized by age, so that each group of subjects is comparable on the variable of age. Subjects can then be randomly assigned to one of the four treatment groups after being matched.<sup>236</sup> Given the nature of the issue, both questionnaires and observation should be employed: participants in the study can provide researchers with latent information, such as personal perceptions of mediation and assessment of individual bargaining power; while researchers can also study objective variables, such as expressions of lack of self-confidence.<sup>237</sup> While certainly not definitive, such a model could be modified as required to assess gender disparity and possible remedies. Such a model could also allow for repeated trials in a variety of contexts, allowing a simplified meta-analysis.<sup>238</sup>

## VI. CONCLUSION

While the goal of mediation is to ensure bargaining equity for a mutually acceptable resolution to the parties' dispute, this very goal may be undermined when the disputing parties are of different genders. A detailed empirical model may serve to answer some of the lingering questions as to gender's impact on mediation process and outcomes. Such a model could

---

*supra* note 110, at 78 (stating that using "enough subjects . . . reduce[s] chance variation in the results").

<sup>234</sup> Such programs may include small claims and other court-annexed programs, as well as private dispute resolution mechanisms such as the Better Business Bureau dispute resolution process, as well as workplace and domestic disputes. *See, e.g.*, Rack, *supra* note 125. Admittedly, given the nature of mediation as, generally, a voluntary process, any sample may "undercover" the population. That is, only those women and men who choose to participate in mediation will actually be studied. MOORE, *supra* note 110, at 51, 62.

<sup>235</sup> *See, e.g.*, BABBIE, *supra* note 99, at 242-44.

<sup>236</sup> *Id.*

<sup>237</sup> *See id.* at 238; *see generally* DAVID W. MARTIN, DOING PSYCHOLOGY EXPERIMENTS (1985); WILLIAM RAY & RICHARD RAVIZZA, METHODS TOWARD A SCIENCE OF BEHAVIOR AND EXPERIENCE (1985). Nevertheless, researchers Walters, Stuhlmacher, and Meyer caution that self-reports may be misleading. Walters et al., *supra* note 17, at 7 (stating that "[s]elf-judgments of behavior may be substantially different from others' appraisals as well as from objective indices of the same behavior").

<sup>238</sup> That is, studies from different settings could be combined to assess an overall statistical trend. MOORE, *supra* note 110, at 97.

also be modified to determine the effects of additional variables, such as race and age, on mediation experience and outcome.

If mediation is procedurally inferior to traditional litigation when there is a disparity between the disputing parties' bargaining powers, then study must be undertaken to assess specific remedies. By recreating mediation in a transformational paradigm, one in which the parties can establish equitable bargaining power which otherwise may not exist outside the context of mediation, mediators and administrators of mediation programs can offer safeguards to disputing parties which will ensure mediation maintains its primary purpose—to effectively promote the self-determination of the parties in the settlement of their disputes.

